

Hon. Judge Jack Weinstein
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201
February 12, 2016

FILED
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U.S. DISTRICT COURT E.D.N.Y.

★ FEB 24 2016 ★

BROOKLYN OFFICE

Dear Judge Weinstein,
I am enclosing a copy of the
Brief I submitted to the Supreme Court
regarding the motions before your Court
and the 2nd Circuit.

Please be advised the brief to
the Supreme Court was filed due to the
fact I have been recently diagnosed
with bone cancer and I am waiting for
a transfer to a Medical Facility.

Therefore I hope that you will
take into consideration this new
development when reviewing the motion
I submitted last month. Also be
advised I did not include Exhibits "A"
through "C" with the enclosed motion
because they are the same exhibits
provided last month, but enclosed Appendix
"D".

Respectfully Submitted
Stephen Cerasi P.A.

IN THE
SUPREME COURT OF THE UNITED STATES

In Re Stephen Caracappa

**PETITION FOR AN EXTRAORDINARY WRIT FOR RELIEF
FROM A CRIMINAL JUDGMENT PURSUANT TO
SUPREME COURT RULE 20 AND 28 U.S.C. § 1651(a).**

Stephen Caracappa
Submitted Pro-Se
Reg. No. 04597-784
FCC, USP II
P.O. Box 1034
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QUESTIONS PRESENTED.

Whether exceptional circumstances now exist from Petitioner recently being diagnosed with an advanced stage of lung cancer that would warrant this Court to exercise its discretionary powers to grant Petitioner an Extraordinary Writ in order to decide Petitioner's claim that his conviction was in violation of Constitutional Law. (1) Lack of jurisdiction under the statute of limitations and (2) a Brady Material Violation.

(i)

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

- (1) US Attorney Office
Eastern District of New York
One Pierrepont Plaza
Brooklyn, NY 11201
- (2) US Solicitor General
Department of Justice
Room 5614
450 Pennsylvania Ave. N.W.
Washington, D.C. 20530-0001

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THE SUPREME COURT
OF THE UNITED STATES

In Re Stephen Caracappa

Related Case No.
05-CR-192(JBW)
11-CV-4921(JBW)

JURISDICTIONAL STATEMENT

The United States Supreme Court has authority to issue all writs necessary or appropriate in aid of [its].... "jurisdiction and agreeable to the usages and principals of law." 28 U.S.C. § 1651(a). This includes the writs of exceptional and extraordinary circumstances that warrant the exercise of the Court's discretionary powers pursuant to Supreme Court Rule 20.

PRELIMINARY STATEMENT

The issues set forth within this writ are currently pending in the District and Second Circuit Court of Appeal under 28 U.S.C. § 2255(F)(4), § 2255(h), and § 2244. However, the prevailing exceptional circumstances that warrant the Supreme Court to exercise its discretionary powers and intercede in the case is that Caracappa is 74 years old and has recently been diagnosed with an advanced stage of lung cancer which could ultimately become terminal. Therefore, making it imperative for this Court to resolve this complex issue of Law present within petition in order to avoid a complete miscarriage of justice that if not

addressed could very well allow an innocent man to die in prison.

STATEMENT OF CASE

Petitioner Stephen Caracappa, along with his co-defendant Louis Eppolito, were charged in the Eastern District of New York. Which Count One alleged a 26 year long racketeering conspiracy that charged 17 racketeering acts, 14 of which allegedly took place in New York City between 1986 and 1993 (hereafter New York Acts), when both co-defendants were members of the New York Police Department (NYPD). Act 15 alleged that Eppolito alone had participated in an unlawful monetary transaction in Nevada between October 2004 and March 2005. Act 17 alleged that both Caracappa and Eppolito engaged in a narcotics conspiracy in Nevada in October 2004 and March of 2005(hereafter the Nevada Acts). The Government never alleged nor produced any evidence to the jury during trial that Caracappa had committed or participated in any racketeering acts between 1991 and October of 2004.

During trial, the Defense discovered that the Government could be withholding favorable evidence that would implicate former FBI Special Agent Lindley DeVecchio as to an alternative source that provided confidential Law Enforcement information to Anthony Casso, and other Mafia Members. The Government denied these allegations. Specifically, the Government states in a letter to this Court, dated April 2, 2006 (Docket NO. 268).

There is absolutely no information to suggest that DeVecchio was in any way involved with Anthony Casso. DeVecchio worked on the Colombo Squad in the FBI and the Government is not aware of any information to suggest that DeVecchio knew about or spoke to Anthony Casso during the 1980's or 1990's.

Consequently, based on the above information, the Defense Counsel made a tactical decision not to call Anthony Casso as a Defense witness, nor implicate former Special Agent DeVecchio as the actual source that had provided confidential Law Enforcement information to several alleged Mafia Members as an alternate defense strategy.

However, it has been recently discovered through FBI 302 forms and multiple other sources that the Government had abundant Knowledge that Special Agent DeVecchio was more than likely the source that divulged the confidential Law Enforcement information that Caracappa and his Co-defendant had been accused of.

A jury convicted Caracappa and his Co-defendant on all counts of the indictment. However, Judge Weinstien granted a defense motion under Fed. R. Crim. P. 29 to dismiss the convictions on Count One. Which held *inter-alia* that because the Government failed to prove that the New York Acts and the Nevada Acts were included in a single continuous RICO conspiracy and that the statute of limitations established in 18 U.S.C. § 3282(a)

had expired on the RICO conspiracy. The conviction under counts two (2), three (3), and four (4) were set aside due to spill over prejudice from the proof presented in Count One.

The Government appealed the trial Court's order of acquittal, where the Second Circuit of Appeals reversed the District Court's decision. Thus, reinstating the jury verdict on all four (4) counts of the indictment, see **United States v. Caracappa**, 543 F.3d 25, 55 (2nd Cir. 2008).

It was discovered long after the Circuit Court reinstated the jury's guilty verdict that the District Court had erroneously instructed the jury where it extended Act 8 of the RICO conspiracy by 10 years longer than it was charged within the indictment. Thus, having an adverse impact on the jury's deliberations in deciding whether the New York Acts were separated by more than 10 years from Caracappa's alleged participation in the only Nevada act that he was charged with.

Caracappa has acted with due diligence trying to get both these issues heard on the merits [(1) the Brady violation and; (2) the erroneous jury instruction] Through several post conviction motions only to be procedurally barred. Therefore, he now prays that this Court will grant his extraordinary writ based on the exceptional circumstances now presented to this Court, or as an

alternative, to order the lower Courts to review the motions that are pending before them, on the merits of his claim, without any procedural impediments.

REASON FOR GRANTING PETITION

FAVORABLE HISTORY OF THE GREAT WRIT

Cursory review of "Federal Habeas Corpus Practice and Procedure", § 2.5, pp. 98-101, Randy Hertz, James S. Liebman, Fifth Edition, reveals that the Court recognizes a range of exceptions to its various preclusion doctrines in habeas corpus, including, but not limited to innocence, and that the overall collection of recognized exceptions is not very different from the meaning the Court has assigned to "misdemeanor of justice" in other contexts. Id. at 98. For example, in one or another context, the Court supplements its willingness to sidestep procedural obstacles upon a showing of the petitioner's probable innocence with a willingness to do the same when necessary:

(1) to assure federal Court redress for:

- (a) "structural defects in... Id;
- (b) violations of "fundamental... Id. at 99;
- (c) procedures that "had... Id.; and
- (e) "deliberate and especially egregious error[s] that are combined with a pattern of prosecutorial misconduct [that] so infect[s] the integrity of the proceeding[s] as to

Innocence is not, however, a necessary condition of habeas corpus relief... Nor is innocence a sufficient condition of habeas corpus relief. Id. at 102.

Fay v. Noia, 372 U.S. 391 (1963).

Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. Id. at 401. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Id. at 401, 402. Its root principal is that in a civilized society, the Government must always be accountable to the judiciary for a man's imprisonment. Id. at 402. [T]he federal courts have the power and the duty to provide [a remedy]. Id. at 441.

Over the years the Supreme Court has developed a highly inquisitive jurisprudence concerning the administration of justice through the Great Writ, which allows for a petitioner to be heard on the merits of his claim. The following cases highlight the Courts reasonings:

1. **Brecht v. Abrahamson**, 507 U.S. 619, 638 n.9 (1993)[citing **Greer v. Miller**, 438 U.S. 756, 769 (1997)(Stevens, J., concurring in the judgement)].

2. Fraud on the Court is defined as a lawyer's or party's misconduct in a judicial proceeding so serious that it undermines or is intended to undermine the **integrity of the proceeding**. Black's Law Dictionary, Seventh Edition. pp. 671 (1991)(bold added).

Jones v. Cunningham, 371 U.S. 236 (1963)

[T]he statute does not... attempt to limit the situations in which the writ can be used. *Id.* at 238. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy. *Id.* at 243.

Peyton v. Rowe, 391 U.S. 54 (1968)

[T]he [habeas] statute does not deny the federal courts to fashion appropriate relief other than immediate release. *Id.* at 66. Since 1874, the habeas corpus statute has directed the courts to determine the facts and dispose of the case summarily, "as law and justice require." *Id.* at 67.

Harris v. Nelson, 394 U.S. 286 (1969)

There is no higher duty of a court under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus... *Id.* at 292.

Kuhlmann v. Wilson, 477 U.S. 436 (1986)

In decisions of the the past two or three decades construing the reach of the habeas statutes, whether reading those statutes broad or narrowly, the Court has reaffirmed that "habeas corpus had traditionally been regarded as governed by equitable principals." *Id.* at 447.

Greer v. Miller, 483 U.S. 756 (1987)

On the other hand, there may be... incidents of prosecutorial misconduct, that the integrity of the process is called into question. In such an event, habeas corpus relief should be afforded. *Id.* at 769 (Stevens, J., concurring in judgment).

Brecht v. Abrahamson, 507 U.S. 619, 123 L.Ed.2d 353 (1993)

Our holding does not foreclose the possibility that in an unusual case, [an error] that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. 123 L.Ed.2d at 373 n.9.

On June 12, 2008, the Supreme Court decided **Boumediene v. Bush**, 553 US 723 (2008) No. 06-1195. In that decision, the Court extended statutory habeas jurisdiction to aliens detained abroad at Guantanamo Bay. The majority opinion of the Court said that the habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted. *Id.*, slip op. at 50... Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances... See also **Schlup v. Delo**, 513 U.S.

298, 319 (1995)(Habeas "is, at its core, an equitable remedy") **Jones v. Cunningham**, 371 U.S. 236, 243 (1963)(Habeas is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). *Id.* at 50, 51. See also Doc. 6 at 2.

[T]oday's decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation. *Id.*, slip op. at 3. (Justice Souter, with whom Justice Ginsburg and Justice Breyer join, concurring).

This is an unusual case. The history of the Great Writ from the Crown to the present supports that there is no limit to the situations in which the writ can be used. The habeas court is obligated to exercise its inherent equitable powers to address a miscarriage of justice whether committed on a court in Virginia, or a detainee in Guantanamo Bay.

Based on the above, this Court should resolve Caracappa's extraordinary writ on the merits to his claim considering the exceptional circumstances surrounding this case that will be fully addressed below.

The History of the Erroneous Jury Instruction as it Relates to the Statute of Limitations Defense.

The Defense's entire trial strategy was premised on the statute of limitations issue. Specifically, the Defense argued that the New York Acts were entirely devoid in

similar purpose and scope as related to the Nevada Acts, and that the Government's evidence at best, proved two (2) independent and distinct conspiracies. Which established that the New York conspiracy had come to its conclusion long before the Government had filed its indictment in March of 2005. As requested by the Defense, the District Court gave extensive instructions to the jury in relation to the statute of limitation. (See App. at B1)³ Additionally, another aspect to the statute of limitation provided for the separation between racketeering acts by more than ten (10) years.

The District Court instructed the jury as follows:

Now I'm going to talk to you about racketeering acts. You must not find the defendant guilty of the racketeering conspiracy charged in count one (1) unless all of you concur that the defendant ultimately agreed that in total, the members of the conspiracy would commit at least two (2) racketeering acts separated by not more than ten (10) years. And you must be unanimous as to at least the same two (2) racketeering acts. (See App. at B5).

The Court went on to instruct the jury in each individual act charged in the indictment. However, when the court referenced Act Eight (8), it erroneously gave the "wrong date". Falsely causing an extension of the predicate

³ See at in parenthesis proceeded by a number reference to the Appendix section of the record for verification of stated facts present within this motion.

act by approximately ten (10) years past the date that was charged within the indictment.

The following is what the jury was instructed as to Act Eight (8):

Racketeering Act Eight (8), obstruction of justice. Defendants are charged between "November 1st 1997 and March 1st 1988 approximately." These defendants did knowingly, intentionally and corruptly obstruct, influence, and impede the due administration of justice by disclosing sensitive law enforcement information regarding Peter Savino. (See App. at B35,36).

However, the indictment clearly charged both defendants as to Act (8) with the following:

On or about and between November 1987 and March 1, 1988, both dates being approximate and inclusive within the Eastern District of New York and elsewhere, the defendants Stephen Caracappa and Louis Eppolito, together with others, did knowingly, intentionally and corruptly obstruct, influence and impede the due administration of justice, to with by disclosing sensitive law enforcement information regarding Peter Savino in violation of Title 18 United States Code, Section 1503 and 2. (See App. at A-13-14).

The record clearly demonstrates that the incorrect November 1997 date given by the District Court as to RICO Act Eight (8), erroneously extended the New York Acts all the way into 1997. However, the indictment alleged that Caracappa's last known participation in the New York Acts ends on April 15, 1991 (See App. at A-20-21, at act 15). Furthermore, Caracappa was not charged in RICO Act 16 (Conspiracy to Engage in Unlawful Monetary Transaction)

which his co-defendant Eppolito "alone" was charged with. That act occurred between December 1, 1994, and December 31, 1996, which was the first charge related to the Nevada Acts. Nor did the Government proffer any evidence that Caracappa had any involvement in or knowledge of the unlawful monetary transaction that took place between Eppolito and Kaplan. In addition, the facts clearly show that Caracappa had not moved to Las Vegas at the time that this unlawful transaction occurred. Moreover, Caracappa was charged in only one (1) of the Nevada Acts (Act 17) (See App A-20). Which the Government alleged began on October 25, 2004 and ended with Caracappa's arrest on March 9, 2005. Therefore, the record clearly demonstrates a 13 year separation existed between the New York RICO Acts and the Nevada Acts which the Government had alleged Caracappa participated in.

The jury convicted Caracappa and his co-defendants on all counts of the indictment that each Defendant was charged under. The jury could not have considered the 13 year separation between the New York Acts and the Nevada Acts (or the 10 year statute of limitation) as it related to Caracappa's participation in the entire RICO Conspiracy based on the erroneous jury instruction that extended his participation in the New York Acts by approximately ten (10) years. However, the District Court clearly relied on the correct dates to each overt act where the

Court granted a defense motion under Fed. R. Crim. P. 29 to dismiss the convictions on count one (1). Which held **inter alia** that because the Government had failed to prove that the New York Acts and the Nevada Acts were included in a single continuous RICO Conspiracy and that the statute of limitations established in 18 U.S.C. § 3282(a) had expired on the RICO Conspiracy. The conviction under counts two (2), three (3), and four (4), were set aside due to spill over prejudice from the proof presented in count one (1).

The Government cross appealed the trial court's order of acquittal. The Court of Appeals reversed the District Court's decision. Thus, reinstating the jury verdict on all four (4) counts of the indictment, which held in **Caracappa** 543 F.3d 25:

On the record we cannot conclude that the association of Eppolito and Caracappa as partners in providing services to members and associates of organized crime had ceased to exist before March 9, 2000 as a matter of the law. That issue was within the province of the jury to decide as a question of fact, and the record provided ample evidence to permit the jury to find that that enterprise continued to exist well into the five-year period that proceeded to commencement of this prosecution. **Id.** at 52.

However, within the above opinion, the record is devoid of any reference, nor did the Appeals Court take into consideration, thus evaluate the District Court's erroneous jury instruction which unquestionably tainted the accuracy reflected in the jury verdict, as it relates

to the statute of limitation issue, that the jury was charged with to determine written within the Court's opinion.

The Flawed Jury Instruction Deprived Petitioner of Several of His Constitutional Protections.

One (1) of the key elements in a RICO Conspiracy is that the Government must prove beyond a reasonable doubt to the jury is; (1) the defendant committed at least two (2) predicate acts of racketeering within ten(10) years of one another, see 18 U.S.C. § 1961 (5)(1998); (2) that these racketeering predicates are interrelated; and (3) that the reveal continued, or the threat of continual racketeering activity; **H.J. Inc. v. Northwestern Bell, Tel. Co., U.S. 229, 236-239 (1989)**. The requirements of relatedness and continuity prevent the application of RICO to isolate or sporadic criminal acts. **United States v. Burden, 600 F.3d 204, 216 (2nd Cir. 2010)** citing **United States v. Indelicato, 865 F.2d 1370, 1375-76 (2nd Cir. 1989)**.

The Sixth Amendment provides that those "accused of a crime have the right to a trial by an impartial jury." This right, in conjunction with due process, requires that each element of a crime be proved to a jury beyond a reasonable doubt, **In re Winship, 397 U.S. 358 (1970)**. The substance in scope of the right depends upon the proper designation of the facts that are elements of the crime, such as the factual aspect to the

statute of limitation issue in the instant case.

Additionally, the *In re Winship*, Court expressly held, that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt "every fact" necessary to constitute the crime with which he is charged.

Therefore, the question that must be answered is "how could the jury make an accurate finding of the facts (regarding the statute of limitation questions), which when they were given an instruction that erroneously extended the life of the New York Conspiracy to which actually closed a thirteen (13) year gap to under ten (10) years in the overt acts that Caracappa had been charged with." Without this error, the jury could easily have determined the facts to the statute of limitation issue differently as to Caracappa's participation in the Nevada Acts, and could they have found two (2) separate and distinct conspiracies? Thus providing ample proof that Caracappa is actually innocent of the RICO Conspiracy based on the statute of limitations defense.

As the Supreme Court has articulated, in a criminal trial the Government must prove every element of the offense and the jury instruction violates the due process if it fails to give effect to that requirement. *Middleton v. McNeil*, 541 U.S. 433, 437

(2001) (quoting) **Sandstorm v. Montana**, 442 U.S. 510, 520-21 (1979). Nonetheless, not every imbiguity, inconsistancy, or deficiency in a jury instruction rises to a level of due process violation. The question is "whether the ailing instruction... so infected the entire trial that the resulting conviction violates dur process." **Estelle v. McGuire**, 502 U.S. 62, 72 (1991). "A single instruction to a jury may not be judged in artificial isolation, but must be viewed in context of the overall charge." **Boyde v. California**, 494 U.S. 370, 378 (1990). If the charge as a whole is ambiguous, the question is whether there is a "reasonable likelyhood that the jury has applied the challenged instruction in a way that violates the constitution. *Id.* at 380. To secure reversal based on a flawed jury instruction, a defendant must demonstrate both error and ensuing prejudice, **United States v. Aina-Marshall**, 336 F.3d 167, 170 (2nd Cir. 2003), moreover, jury instructions are erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury of the law. **United States v. Al Kassar**, 660 F.3d 108, 126 (2nd Cir. 2011). See also, **United States v. Ford**, 435 F.3d 204, 209-10 (2nd Cir. 2006).

Petitioner Caracappa has explicitly demonstrated that recently discovered evidence (erroneous jury

instructions) viewed in light of all the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of the RICO Conspiracy based on his statute of limitations defense. Which provided significant grounds for this Court to grant him the relief that he seeks under the All Writs Acts 28 U.S.C. § 1651(a) based on the exceptional circumstances that this case presents will be discussed fully further in this brief.

**Newly Discovered Brady Material
Would Provide For an Alternative Defense Strategy.**

As previously stated, Caracappa's initial § 2255 motion was premised in part on the Government's withholding of crucial evidence that FBI Agent DeVecchio, over a period of several years, had been providing Scarpa and other Mafia Members—confidential law enforcement information. In fact, the improper relationship between Special Agent DeVecchio and Scarpa, a Colombo Family soldier, and longtime FBI Confidential Informant has been the subject of countless Post-Conviction motions and civil suits, as well as books and magazine articles.

In the past few years, numerous Government documents, such as FBI 302 forms and other material, along with several books written by Emmy Award winning investigative journalists have come to light that discloses with graphic detail Special Agent DeVecchio thirty (30) year "unholy alliance" with famed Mafia Killer Gregory Scarpa, Sr.

which undeniably proves that the government intentionally withheld a myriad amount of evidence and other information that clearly established that DeVecchio was the most likely suspect for the source of the leaked confidential information that Anthony Casso received allegedly from law enforcement.

For example, in "**Deal With The Devil**", author Peter Lance writes on page 187 that in one interview on September 23, 2011, with Anthony Casso, Casso stated that Kaplan (the key witness in the instant case) lied on the witness stand.

Specifically, Lance writes:

But when I spoke to Casso via phone from a Supermax prison, he insisted that he first got the identities of his would-be killers from another source (other than Kaplan through Eppolito or Caracappa) Greg Scarpa, Sr. Casso said, when Kaplan got on the stand (at the Mafia Cops Trial) he testified that he met me after I got shot in 1986, two (2) to three(3) weeks later, by a park in Brooklyn, and he brought me the envelope from the two (2) Detectives with all the photographs of the people who shot me and all kinds of information. But that was a lie. A total lie. When I got shot, it was on a Sunday. Greg Scarpa reached out for me the next day, Monday, and I knew everybody who shot me. I knew everybody's name. Jimmy Hydell. It was given to me that Mickey Boy Paradiso was involved. There were four (4) people involved in the actual shooting. When I asked Casso who supplied Scarpa with that intelligence, he named Lin DeVecchio.

It is highly unlikely that the Government "did not possess" the above relevant information through the countless debriefing sessions Casso had given to Law

Enforcement Officials prior to trial or even while Caracappa's original § 2255 motion was still pending. Which now begs the question, did the defense have all the essential and compelling information necessary to make a conscientious evaluation as to whether in the decision not to call Casso as a Defense Witness that would undoubtedly have had an adverse affect as to the truthfullness of Kaplan's testimony.

Furthermore, through extensive research and interviews by Peter Lance discovered and documented in "**Deal With The Devil**", that even though the Casso Debriefings generated 502 pages of FBI 302 forms, where Casso tried to expose the Scarpa/DeVecchio connection as a primary source for confidential Law Enforcement information he had received over the course of several years. The agents (Rudolph and Brennan) refused to hear or even interrogate him on those admissions, thus, threatening to pull the plug and his cooperation agreements if he continued to further implicate an FBI Agent. Therefore, directly affecting the fairness and integrity in Petitioner's initial § 2255 motion. *Id.* at 395-402. However, was this recapitulation accurate, or did at some point, Agents actually record Casso's accounts as to information he received from Scarpa that that clearly came through DeVecchio that could even exonerate Caracappa and Eppolito, that was suppressed

by the Government. Either way, this is a critical development that presents newly discovered evidence that if viewed in light of the evidence as a whole, would undoubtedly prove actual innocence if presented to the jury.

Additionally, this newly discovered evidence demonstrates the magnitude of the Government's Brady material suppression where it failed to turn over all 302 forms from Anthony Casso, Carmine Sessa, Michael Casso, Greg Scarpa, Jr., and Greg Zappola, which now seems to be interrelated as to whether DeVecchio (through Scarpa, Sr.), was actually the law enforcement source. Which calls for further investigation under Habeas Rule 6(a) as Caracappa had requested in his initial § 2255 motion.

The newly discovered Brady material clearly establishes a legal argument that Caracappa is actually and factually innocent of the RICO Conspiracy. Which clearly justifies this Court granting the instant petition.

Furthermore, the newly discovered evidence is clearly a **Brady** claim that has severely deprived Caracappa of his right to due process and his right to a fair trial as provided for under the protection of the Fifth and Sixth Amendments.

Additionally, it is well established that "when a Federal prisoner can demonstrate Actual Innocence on the existing record," and "where the prisoner could not have effectively raised his claim of innocence at an earlier time," (which Caracappa has satisfied both standards). Which would Provide for a retroactive remedy to his claim. **Cephus v. Nash**, 328 F.3d 98, 104 (2nd Cir. 2003).

The United States Supreme Court, in **Bousley v. United States**, 523 U.S. 614 (1998), clarified the standard of demonstrated factual innocence. Relying on its prior cases and especially **Murry v. Carrier**, 477 U.S. 478, 489 (1986), the Court noted that:

... to establish actual innocence, Petitioner must demonstrate that in light of all the evidence it is more likely than not that no reasonable juror would have convicted him.

Actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impedement is a procedural bar as it was in **Schlaf v. Delo**, 513 U.S. 298 (1995) and **House v. Bell**, 547 U.S. 518 (2006), or as it is in the instant case, expiration of statute of limitations. "A petitioner dose not meet the threshold requirement unless he persuades the Federal Court's that, in light of the new evidence, no juror, acting reasonably would have found him guilty based on newly discovered

evidence, (Flawed Jury Instruction and Brady Violation).

In making an assessment to find actual innocence, "the timing of the petition" is a factor bearing on the "reliability of the evidence reporting to show actual innocence. Id. at 332.

The discovery of the erroneous jury instruction and the numerous **Brady** materials that were initially withheld provides significant grounds to establish that Caracappa is both factually and actually innocent of the RICO Conspiracy that would affectively satisfy the gatekeeping provisions to the habeas statute, and warrant a reversal of his conviction.

**EXCEPTIONAL CIRCUMSTANCES EXIST THAT
WARRANT THE SUPREME COURT TO EXERCISE ITS
DISCRETIONARY POWERS TO ENTERTAIN THIS WRIT.**

Both of the above legal arguements have been submitted to the Second Circuit Court of Appeals in an application for a second or successive § 2255 motion under newly discovered evidence. Additionally, the erroneous jury instruction claim was also submitted to the District Court under the newly discovered Fact (f)(4) section to the § 2255 statute which both of these motions are pending at the present time.

The exceptional circumstances that assert this Court's authority to intercede in this case is, directly after Caracappa submitted both habeas motion s to the lower court's, he was diagnosed with an advanced stage of lung cancer. (See App. D Medical Records).

Specifically, in September of 2015, a CAT scan was preformed which discovered approximately a 2cm tumor on Caracappa's right lung with several smaller lesions on both of his lungs. In December, a second CAT scan was preformed that revealed the tumor had grown approximately 1cm (from 2cm to 3cm) in diameter, at which time a biopsy was preformed that determined the tumor was cancerous.

Furthermore, this is the second time that Caracappa has been diagnosed with cancer. The first time was in 1994, at which time he had surgery where they removed ninety percent (90%) of one lobe of his left lung to remove the cancer. Because of his previous lung cancer surgery and his advanced age (74 years old), the treating oncologist informed him that further surgery is out of the question, and because of the location where the new tumor has formed, it cannot be treated with radiation therapy. That leaves Chemotherapy. Caracappa will be moved to a Federal Medical Facility within the next two to three weeks to start his recommended treatment.

With the limited treatment options available to Caracappa, and the fact that he is 74 years old, it is highly unlikely that he will become a cancer survivor for a second time. Consequently, it is imperative that this Court exercise its discretionary powers and rule on the claims that Caracappa has presented in order to prevent

a grave miscarriage of justice that would unjustly allow a man that is actually innocent to pass away while unlawfully being held in prison.

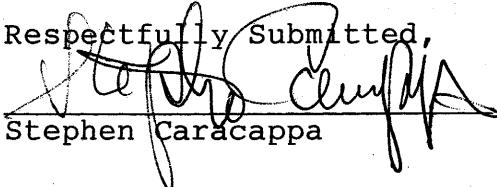
REMEDY THAT PETITIONER REQUESTS.

First, this court has the inherant powers to rule on the merits of the claims to the violations of Constitutional Law presented within this petition. (2nd), to order the lower court's to rule on the merits of the petitions now pending before them, and (3rd), or as an alternative, consider this petition as a writ of prohibition and vacate Caracappa's RICO Conspiracy based on the Governments lack of jurisdiction to try him for the offense in accordance with the statute of limitations defense.

CONCLUSION

Petitioner has presented two (2) very distinct and different discoveries of new evidence that was not previously available to him, that if and when proven, and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of the RICO Conspiracy as charged. If these issues are not decided on the merits, without being procedurally banned, then an actually innocent man could very well die in prison.

Therefore, for the above given reasons, this Court should exercise its discretionary powers and grant petitioner the relief that he seeks through this extraordinary writ.

Respectfully Submitted,

Stephen Caracappa

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Stephen Caracappa — PETITIONER
(Your Name)

VS.

United States Of America — RESPONDENT(S)

PROOF OF SERVICE

I, Stephen Caracappa, do swear or declare that on this date, _____, 20_____, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A EXTRAORDINARY WRIT on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General Of The United States

Room 5614

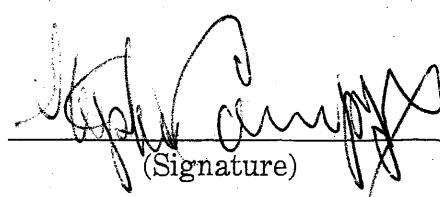
Department Of Justice

950 Pennsylvania Ave. NW

Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Feb Recency 12, 2016


(Signature)